

SUPREME COURT OF YUKON

Citation: *Sidhu v Attorney General (Canada)*,
2022 YKSC 4

Date: 20220127
S.C. No. 14-A0118
Registry: Whitehorse

BETWEEN

MANDEEP SINGH SIDHU

PLAINTIFF

AND

THE ATTORNEY GENERAL (CANADA)

DEFENDANT

Before Justice K. Wenckebach

Appearances:

Counsel for the Plaintiff

André Roothman

Counsel for the Defendant

Jonathan Gorton and
Sylvie McCallum Rougerie

REASONS FOR DECISION

INTRODUCTION

[1] The plaintiff, Mandeep Singh Sidhu, who is of East Indian descent, has brought an action against the RCMP alleging that police officers targeted and racially profiled him during two roadside stops and when he was charged with uttering threats under the *Criminal Code*, R.S.C., 1985, c. C-46.

[2] Mr. Sidhu says that the roadside stops were unlawful and violated his rights under ss. 7, 9, 10(b) and 15 of the *Canadian Charter of Rights and Freedoms Part 1 of the Constitution Act, 1982* (the “*Charter*”). With regard to the criminal charge, he alleges

that he was maliciously prosecuted, unlawfully arrested, denied access to counsel, and assaulted during his arrest.

[3] Although the incidents at issue span four years and involved a number of different police officers, the crux of the matter is whether the members of the RCMP involved were motivated by racism in their decisions about, and interactions with Mr. Sidhu.

[4] During the course of the trial, several members of the RCMP testified. Most, if not all, had been promoted since the incidents in which they were involved occurred. In this decision I will be referring to them by the rank they had at the time of the incident, rather than their current rank.

RESULT

[5] I conclude that Mr. Sidhu was not unlawfully detained at the roadside stops on December 2, 2012, and June 4, 2016.

[6] I furthermore conclude that Mr. Sidhu was not maliciously prosecuted. On December 5, 2012, he was not unlawfully arrested, he was not denied the right to counsel, and he was not assaulted.

ISSUES

- A. Preliminary Application: Similar Fact Evidence
 - I. Process
 - II. Admission of Similar Fact Evidence
- B. Credibility
- C. Knowledge of Mr. Sidhu within the RCMP
- D. December 2: Lawfulness of Detention at Check Stop

- E. December 5, 2012:
 - I. Malicious Prosecution
 - II. Lawfulness of Arrest
 - (1) Reasonable and Probable Grounds and Discrimination;
 - (2) Right to Counsel;
 - (3) Assault

- F. June 4, 2016: Lawfulness of Detention at Check Stop

- G. Damages
 - I. PTSD
 - II. Special Damages

ANALYSIS

A. *Preliminary Application – Similar Fact Evidence*

[7] As a part of his case, Mr. Sidhu sought to introduce similar fact evidence about other interactions he had with the RCMP. I provided my ruling from the bench, with reasons to follow. I will begin with my reasons on that application.

[8] Mr. Sidhu brought an application to introduce similar fact evidence with regard to 32 interactions with RCMP officers. The Attorney General opposed the application. Mr. Sidhu's counsel, in his Brief on Introduction of Similar Fact Evidence, provided a summary of the 32 interactions he was seeking to introduce as evidence.

[9] Before hearing submissions about the merits, the parties sought a ruling about whether it was necessary to enter into a full *voir dire* for the application. I will therefore address this procedural issue before turning to the merits.

I. Process

[10] Mr. Sidhu took the position that a full *voir dire* was required on the application. The Attorney General submitted that, rather than *viva voce* testimony, Mr. Sidhu's counsel could provide a summary of the incidents he was seeking to introduce as

evidence, followed by argument. If, after that, I felt that more information was necessary, *viva voce* evidence could be called.

[11] I determined that a full *voir dire* was not required. Instead, Mr. Sidhu's counsel would provide a summary of the evidence Mr. Sidhu sought to be admitted. If counsel decided the summary would be insufficient to explain certain facts he could raise the issue, and I would then decide if *viva voce* evidence was necessary on those particular facts.

[12] Mr. Sidhu's counsel provided a full summary of the evidence he was seeking to call, and did not seek to call any *viva voce* evidence.

II. Admission of Similar Fact Evidence

(a) Ruling

[13] My decision is that evidence with regard to three incidents identified in the Plaintiff's Brief on Introduction of Similar Fact Evidence is admissible at trial:

- (xxvii) – May 16, 2012, involving Cst. West;
- (xxviii) – November 24, 2012, involving Cst. Potter; and
- (xxxii) – May 19, 2017, involving Cpl. Pollard.

[14] I have decided that evidence about the three incidents is admissible for the purpose of determining whether the individual police officers involved were motivated by racism in their treatment of Mr. Sidhu.

[15] Counsel for the Attorney General submitted that evidence with regard to another incident may be admissible for another purpose. I leave the question of admissibility of the evidence for other purposes to be determined during the course of the trial, if it proves necessary.

(b) Analysis

[16] In determining whether similar fact evidence should be admitted the court must determine whether the probative value outweighs the prejudicial effect (*R v Handy*, 2002 SCC 56 at para. 55).

[17] Here, Mr. Sidhu argued that the evidence is admissible as similar fact evidence. The theory of his case is that for many years he was targeted because of his race by officers. This began when he was living in Watson Lake, Yukon, in the early 2000s, and developed a friendship with a white female RCMP officer. This resulted in racist reactions from other members of the RCMP. Mr. Sidhu experienced many unwarranted stops and negative interactions with RCMP officers which culminated in two arrests.

[18] Mr. Sidhu alleges that the racism he experienced in Watson Lake was then transferred to Whitehorse, such that the police officers in Whitehorse also interacted with him in a racist manner.

[19] He said this evidence shows that there is systemic racism towards him from the RCMP. He relied on case law, including *Radek v Henderson Development (Canada) Ltd*, 2005 BCHRT 302 ("*Radek*"), for the proposition that evidence of similar fact evidence can be admitted for the purposes of establishing systemic racism.

[20] Counsel for the Attorney General distinguishes *Radek* and the other cases that deal with systemic discrimination, arguing that they are simply not relevant, as Mr. Sidhu's claim has no element of systemic discrimination to it.

[21] According to the Attorney General, systemic discrimination is simply another term for "adverse effects discrimination" (*Fraser v Canada (Attorney General)*, 2020 SCC 28 ("*Fraser*"). Adverse effects discrimination is a neutral rule, policy or practice, which is

applied equally, but has a disproportionate negative impact on an identifiable class of people. It is also focused on the effects the discrimination has on a group, rather than on the individual.

[22] Mr. Sidhu's case, the Attorney General submits, does not involve systemic discrimination because it does not involve a rule or practice that is neutral on its face. Moreover, the evidence Mr. Sidhu seeks to admit is not about the impact on a group, but about the impact on him.

[23] While I agree with the Attorney General that the principles of systemic discrimination are not applicable to the circumstances of this case, I disagree with the Attorney General's reasoning.

[24] In my opinion, what makes systemic discrimination unique is that it is focused on the impact that discrimination has on groups, rather than individuals. Because of this, Mr. Sidhu's claim does not involve systemic discrimination, and the case law about systemic discrimination is not applicable.

[25] The concept of systemic discrimination was discussed by the Supreme Court of Canada in *CN v Canada (Human Rights Commission)*, [1987] 1 SCR 1114 ("*CN*"). In *CN* at 1138, the Court adopted Abella J.'s (as she was then) description of systemic discrimination. She stated:

Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics...

[26] This description of discrimination does not limit the application of systemic discrimination to neutral rules which, when applied equally, has a disproportionate impact on groups of people.

[27] In addition, Abella J. states that systemic discrimination includes practices and attitudes that have, by design, a discriminatory impact on an identifiable group. Thus, this description of systemic discrimination includes both direct and adverse effects discrimination.

[28] As well, in *CN*, the claimants faced both direct and adverse effects discrimination. The evidence before the Human Rights Tribunal, and which was referred to extensively by the Supreme Court of Canada, was that women working at the Canadian National Railway faced pervasive overt sexism, from harassment and bullying to outright refusals of foremen to hire women to their crew.

[29] In addition, they faced adverse effects discrimination, such as hiring practices that imposed requirements which were not necessary for the position, and which few women had. The Supreme Court of Canada did not, however, differentiate by labeling the adverse effects discrimination as systemic discrimination while excluding the examples of overt discrimination. Rather, it accepted that the whole of the discrimination faced by the women was systemic discrimination.

[30] Subsequent cases have not limited systemic discrimination to adverse effects discrimination, and have, at times explicitly stated that systemic discrimination includes both direct and adverse effects discrimination (*Brome v Ontario (Human Rights Commission)* (1999), 171 DLR (4th) 538 (Ont Div Ct) at 550 (minority, though not on this issue)).

[31] As the Attorney General has pointed out, the Supreme Court of Canada used the term “systemic discrimination” interchangeably with adverse effects discrimination in *Fraser*. However, in *Fraser* the Supreme Court of Canada was not asked to, and did not decide, whether systemic discrimination was limited to adverse effects discrimination, or if it could also apply to direction discrimination as well.

[32] Accepting the Attorney General’s submission that systemic discrimination is the same as adverse effects discrimination would unnecessarily restrict and complicate the application of the principles of systemic discrimination. To take the example of *CN*, Canadian National Railway had a culture in which harassment and bullying was accepted. This discrimination did not involve a neutral rule applied equally to men and women. However, if systemic discrimination is limited to adverse effects discrimination, then the principles and remedies associated with systemic discrimination could not be applied to all the facts of *CN*.

[33] In my opinion, the essential element of systemic discrimination is not that it is adverse effects discrimination, but, rather, it is about the effect of discrimination on classes of people, rather than on individuals. This has been implicitly recognized by the Supreme Court of Canada in *CN* at 1118 and *Moore v British Columbia (Education)*, 2012 SCC 61 (“*Moore*”) at paras. 59 and 64.

[34] The Court of Appeal for British Columbia has also differentiated systemic discrimination from individual claims of discrimination on the basis of its focus on populations of people. In *British Columbia v Crockford*, 2006 BCCA 360 (“*Crockford*”), the Court stated:

[49] A complaint of systemic discrimination is distinct from an individual claim of discrimination. Establishing systemic

discrimination depends on showing that practices, attitudes, policies or procedures impact disproportionately on certain statutorily protected groups: see **Radek** at para. 513. A claim that there has been discrimination against an individual requires that an action alleged to be discriminatory be proven to have occurred and to have constituted discrimination contrary to the **Code**. ... [emphasis in original]

[35] Differentiating between individual claims of discrimination and systemic claims of discrimination is not always necessary or useful (*Moore* at paras. 59-61). However, on certain issues it is necessary to distinguish between the two. In *Moore*, for instance, the Supreme Court of Canada stated that different evidence may be required in individual claims from those of systemic discrimination claims (para. 64).

[36] Similarly, in *Crockford* at para. 49, the Court stated:

... The types of evidence required for each kind of claim [systemic and individual] are not necessarily the same. Whereas a systemic claim will require proof of patterns, showing trends of discrimination against a group, an individual claim will require proof of an instance or instances of discriminatory conduct.

[37] Systemic discrimination, therefore, includes both direct and adverse effects discrimination. What is essential to systemic discrimination, however, is that it concerns the effect of discrimination on a group rather than on an individual.

[38] Applying the principles to the case at bar, the evidence Mr. Sidhu seeks to introduce is about a pattern of behaviour against him as an individual and not a pattern of behaviour against a group. Because of this, the evidence he seeks to admit is not evidence of systemic discrimination. In addition, his claim is about alleged wrongs done to him alone, and so is not systemic. The principles about the admissibility of similar facts evidence to cases of systemic discrimination are therefore not applicable.

[39] Furthermore, in my opinion, the similar fact evidence Mr. Sidhu seeks to introduce is not probative. For the most part, the similar fact evidence Mr. Sidhu seeks to introduce is about the actions of police officers who are not specifically named in the statement of claim. Mr. Sidhu says that the evidence is relevant, nonetheless, because it shows a pattern of discriminatory behaviour, which can then be imputed to the police officers named in the action.

[40] The fallacy in Mr. Sidhu's argument is that the existence of a pattern of discrimination in an organization does not prove that an individual operating within that organization acts in a discriminatory manner. Thus, even if there is a culture of discrimination within the RCMP, and because of this culture, Mr. Sidhu was targeted, it cannot be concluded that every RCMP member will behave in a discriminatory manner when interacting with Mr. Sidhu. Evidence of attitudes of some or even most RCMP members is not probative of the attitudes of all RCMP officers.

[41] Counsel to the Attorney General also submitted that, as Mr. Sidhu is alleging the police officers named in the statement of claim were tainted from what they learned about incidents Mr. Sidhu had with other RCMP officers, what is relevant to the case at bar is not what actually occurred, but what the police officers named in the statement of claim heard and believed about Mr. Sidhu. This evidence can be drawn from the named police officers themselves. It is not necessary to attempt to discern what happened between Mr. Sidhu and other police officers. I agree with the Attorney General.

[42] Although most of the similar fact evidence Mr. Sidhu sought to introduce is not probative, I conclude that evidence about three incidents is probative: a traffic stop on

May 16, 2012, involving Cst. West; a traffic stop on November 24, 2012, involving Cst. Potter; and a traffic stop on May 19, 2017, involving Cpl. Pollard.

[43] The officers involved in these traffic stops are named in the statement of claim. As a result, Counsel to the Attorney General concedes that the traffic stops involving Cst. West and Cst. Potter may be probative, but says that, as the stop involving Cpl. Pollard occurred after the one in which he is named, and after the filing of the statement of claim, it is not probative.

[44] I find that the stop involving Cpl. Pollard is probative, as racial bias can exist through time. An incident showing racial bias is therefore probative regardless of whether it occurred before or after the named incident.

[45] Thus, while most of the evidence Mr. Sidhu seeks to admit is not probative, the evidence about three highway stops is.

[46] Turning to the issue of prejudice, I conclude that, even if the evidence involving police officers not named in the statement of claim is probative, the prejudice caused to the Attorney General does not warrant admitting the evidence.

[47] On the other hand, there is little prejudice to the Attorney General in admitting the evidence about the three highway stops that I found are probative.

[48] With regard to the evidence involving police officers not named in the statement of claim, Mr. Sidhu sought to introduce incidents involving the police dating back to 2004. In some of the incidents Mr. Sidhu cannot name the police officer involved, or provide a specific date. It would therefore be difficult, if not impossible, for the Attorney General to respond.

[49] Even for situations in which names of the police officers are provided, it is reasonable to assume that the police officers would not have good recollections of incidents occurring 14 or 15 years ago.

[50] The Attorney General would also likely seek to call reply evidence, which would substantially increase the amount of time the trial would take.

[51] Most importantly, I believe that admitting the evidence would have the result of sidetracking the proceedings. Mr. Sidhu seeks to introduce evidence about 32 incidents. In contrast, the action concerns two check stops, and an arrest for a charge of uttering threats.

[52] It is my opinion that if the evidence were to be introduced, the focus of the proceedings would shift to actions of various police officers and the environment within the RCMP over the course of years rather than on the actual issues in the claim.

[53] However, I find that the prejudice in introducing evidence about the May 16, 2012, November 24, 2012, and May 19, 2017 stops would be minimal. Counsel to the Attorney General agreed that there would not be much prejudice in admitting evidence about the May 16 and November 24 stops. Cst. West and Cst. Potter were to be called as witnesses in any event. In addition, the evidence would not be unduly long, and could be focused on the pertinent issues.

[54] Counsel to the Attorney General said that Cpl. Pollard would not be giving evidence on behalf of the defendant, and this would cause prejudice to the Attorney General if evidence of the stop involving Cpl. Pollard was called. Counsel did not at the time explain why Cpl. Pollard would not be called. I conclude that, as a named officer in the claim, the Attorney General should not be taken by surprise that Cpl. Pollard might

be required to give evidence. The Attorney General would therefore not be unduly prejudiced if evidence were to be called about that stop, as well.

[55] For these reasons, evidence about the stops on May 16, 2012, November 24, 2012, and May 19, 2017, is admissible at trial.

[56] Despite my ruling, Mr. Sidhu's counsel discussed, in his argument, evidence about Mr. Sidhu's interactions with police, which I ruled were inadmissible. I have not taken these submissions into consideration in my decision.

B. Credibility

[57] As there are many material facts in dispute, the determination of credibility is important in this matter. Mr. Sidhu is the central witness, and has thus testified to each incident. Therefore, I will provide general observations about Mr. Sidhu's credibility first. Questions about the credibility of other witnesses will be determined when I analyse each incident.

[58] There are problems with Mr. Sidhu's credibility. On the whole, Mr. Sidhu provided evidence that was internally inconsistent, and inconsistent with independent evidence. He had gaps in his memory, as well. He was also at times, evasive on cross-examination. He provided implausible testimony, and, on one occasion admitted to not having been truthful during one of the incidents at issue.

[59] On direct examination Mr. Sidhu provided detailed testimony, delivered without hesitation. On occasion, he would clarify a response if he believed that he may have misspoken. He seemed to have a thorough recall of events, including recalling relatively minor details.

[60] This apparent ability to recall events in detail was not sustained on cross-examination, however. Mr. Sidhu's testimony was, at times, inconsistent with independent evidence. For example, Mr. Sidhu was arrested at his family's laundromat. He denied that his father was at the laundromat. In an audiotape from the police cruiser into which Mr. Sidhu was placed, and while the police cruiser was still outside the laundromat, Mr. Sidhu is heard to say, "that's my dad. You should roll down the window". Even when this was pointed out to him in cross-examination, Mr. Sidhu did not remember his father being there.

[61] He also could not remember if, after his arrest, he spoke to his lawyer before or after he appeared in court.

[62] Mr. Sidhu's counsel submits that Mr. Sidhu's memory lapses are normal and cannot be expected to remember all of what occurred many years ago.

[63] I agree that it is natural for memories to fade. No issue arises where these memory lapses are about minor issues. Lapses of memory that concern material information, however, have an impact on his reliability.

[64] Mr. Sidhu also minimized his actions. For instance, Mr. Sidhu placed phone calls to the RCMP in which he would be verbally aggressive with the person answering the call. On one occasion he called about someone being dropped off in front of his work, and yelled to the operator "you are going to shut the fuck up right now, bitch."

[65] In another, Mr. Sidhu phoned the RCMP to complain that two officers were tailgating each other in their cars ahead of him on the road. He became very agitated during the call, yelling and swearing about the RCMP officers, and at one point telling the phone operator "shut the fuck up, you fucking loser." During testimony he explained

that he thought the police officers were intentionally tailgating each other and that they were doing it to target him.

[66] In court, Mr. Sidhu seemed unconcerned by his actions. At one point he laughed while one of the calls was played back. In his testimony, he explained that his phone calls to the telephone operators were appropriate because they were part of the RCMP. After a couple of the phone calls were played in court, Mr. Sidhu also added that he was frustrated because the RCMP kept showing up at his business and antagonizing him.

[67] Mr. Sidhu's counsel submits that Mr. Sidhu's reactions were in response to the harassment and racism that he had to endure from the police for many years. Mr. Sidhu did, at times, say that he was reacting to the RCMP's actions. Most often, however, he justified his responses, and minimized his actions. He did not, at any point, indicate that he overreacted or misdirected his anger. This raises concerns about Mr. Sidhu's judgment.

[68] Mr. Sidhu's evidence was also, at times, implausible. After he was charged with uttering threats, Mr. Sidhu called the RCMP and asked the person who answered the phone what constituted a threat against the police. When a recording of the call was played in court, Mr. Sidhu testified that he phoned because he wanted to understand why he was charged with uttering threats.

[69] I find this answer disingenuous. Mr. Sidhu had a lawyer to whom he could have asked questions about his charges. Mr. Sidhu's question was vague, and no real response could be given to it. Mr. Sidhu finished the call by saying: "You sound really fucking stupid. You really do sound dumb," and hanging up. The call was not that of a person with a genuine question seeking an answer.

[70] Mr. Sidhu was also evasive during cross-examination. For example, when asked if, during one check stop he “produced” his driver’s licence, Mr. Sidhu stated that he had. Upon further questioning he ended up agreeing that he had shown the police officer his driver’s licence, but had not actually given it to him. It appeared that Mr. Sidhu seized on a semantic difference in the words “produce” and “give” to avoid answering the question.

[71] Finally, Mr. Sidhu admitted on the stand that he had not been truthful. After he was arrested on December 5, 2012, Mr. Sidhu was taken by police car to the courthouse. The trip was taped on the video recording device contained in RCMP cars, the “Video Incident Capture System” (“VICS” video). As the police came to a stop at the courthouse, Mr. Sidhu is seen to hit his head on the clear partition between the driver and the backseat. The video shows him exclaiming loudly that the police officer had done it on purpose. In the video he then talks about how much his head hurt from hitting his head. In cross-examination, upon viewing the video, and being asked about whether his head hurt, Mr. Sidhu said that he had “embellished” it.

[72] It is serious when a police officer injures a person, and can have important repercussions on the police officer, as it should. That Mr. Sidhu decided to lie in such circumstances undermines his credibility.

[73] As a result of these concerns I have approached Mr. Sidhu’s evidence with caution.

C. Knowledge of Mr. Sidhu within the RCMP

[74] In addition to credibility, another question underpinning this matter was what the police officers named in the statement of claim knew about Mr. Sidhu, and how they

learned about him. This arises because Mr. Sidhu alleges that information and misinformation about his interactions with the RCMP in Watson Lake was communicated to Whitehorse, and that RCMP members in Whitehorse became tainted with the Watson Lake RCMP members' racist approaches to Mr. Sidhu. They then also targeted him because of his race.

[75] I find that, until December 2012, some of the named members in the statement of claim had some knowledge about Mr. Sidhu and his interactions in Watson Lake, but others did not. He also did not occupy much of their time or their interest.

[76] However, after December 2012, there grew a collective awareness of Mr. Sidhu, and a perception that he was harassing to members of the RCMP. This was caused primarily by Mr. Sidhu's own actions.

[77] All the RCMP witnesses were questioned about what they knew about Mr. Sidhu either before they interacted with him, or at the time they interacted with him. What emerged from the evidence was that some did not know Mr. Sidhu at all, or knew about him from situations unrelated to the RCMP.

[78] Others had some information about him, including some of the interactions he had with the RCMP in Watson Lake. During the trial it came out that Cst. West told Cpl. Pollard during a stop on May 16, 2012, that he recognized Mr. Sidhu from warnings, and that "he was not all there". This confirms that some RCMP members did know of Mr. Sidhu. However, the thrust of the testimony of all the RCMP members was that Mr. Sidhu was simply not a frequent topic of conversation nor of great interest to them.

[79] Indeed, there was even evidence that in Watson Lake, where Mr. Sidhu says the racism began, and where he was targeted over and over again, he was not considered a topic of interest. Cst. Allain, a member of the RCMP, testified during trial. He had been stationed in Watson Lake from 2008-2010, a time in which Mr. Sidhu says he was subject to racism from the RCMP there. Cst. Allain said that his Watson Lake colleagues did not complain about Mr. Sidhu's conduct.

[80] Mr. Sidhu's lawyer also filed RCMP documents about Mr. Sidhu, including Canadian Police Information Centre ("CPIC") print outs, Involved Person Reports, and others. Mr. Sidhu's lawyer's suggestion, as I understand it, is that these documents show Mr. Sidhu was targeted, and that RCMP members could learn about Mr. Sidhu through these documents.

[81] Aside from Cpl. Dunmall, Mr. Sidhu's lawyer did not question any of the police officers about whether they created or accessed the documents filed as evidence. There is therefore no evidence that the RCMP officers named in the statement of claim saw or created the CPIC print outs, the Involved Person Reports, or most of the other documents filed by Mr. Sidhu's lawyer.

[82] The exception to this is an Officer Safety Bulletin about Mr. Sidhu, created on December 3, 2012 (the "Bulletin"). Several of the officers who testified alluded to having read this document. It was written as a result of Cpl. Dunmall's meeting with Mr. Sidhu on December 2, 2012. It states, in part:

Two members to respond to calls involving SIDHU, unpredictable, extreme emotions and violence, resisted arrest, attempted to cut self with keys, banged head on ground and ate dirt, attempted to strangle self in cells and self hurts and has also parked outside members' private residences.

[83] This portion of the Bulletin references one of Mr. Sidhu's interactions with police in Watson Lake, although it does not state that the incident took place in Watson Lake. Mr. Sidhu's lawyer asks the Court to infer that RCMP officers would develop or deepen their racist tendencies towards Mr. Sidhu after reading the Bulletin, and especially after reading misinformation about the incident in Watson Lake contained in the document.

[84] There is a clear implication in the Bulletin that Mr. Sidhu has mental health issues that contribute to his risk. I do not see, however, how this relates to his race, or how this document would cause police officers to respond in a racist fashion to Mr. Sidhu.

[85] I therefore conclude that, until December 2012, the RCMP officers named in the statement of claim did not have much, if any knowledge about Mr. Sidhu, and that he was not a topic of conversation amongst RCMP members.

[86] The Attorney General argues that the RCMP did begin to treat Mr. Sidhu differently than others, and did eventually come to see him as problematic. The Attorney General says, however, that this was because of Mr. Sidhu's own actions.

[87] I agree with the Attorney General. I find that this collective awareness and perceptions of Mr. Sidhu began to develop after December 2012. This was triggered because of his arrest. It continued and grew, however, because Mr. Sidhu began to seek out interactions with the RCMP, and behaved aggressively during the interactions.

[88] Soon after Mr. Sidhu was charged, Sgt. Wyers sought that all contacts between Mr. Sidhu and RCMP members be noted on file. This was because, he said, of the number of complaints Mr. Sidhu lodged against police, his threats, and access to information requests. The collected information was then monitored and assessed by the RCMP. (This evidence is contained in a document that was filed for the purposes of

showing the RCMP members' perceptions of Mr. Sidhu, and not for the truth of its contents. However, I took from Mr. Sidhu's counsel that he did not dispute that RCMP members were asked to provide information about their interactions with Mr. Sidhu.)

[89] At about the same time, Mr. Sidhu began to seek out contact with the RCMP, and acted in an antagonistic manner towards them. For instance, Mr. Sidhu agreed during cross-examination that in April 2013, he called the RCMP Whitehorse detachment and asked to speak with Cpl. Dunmall. As she was not available, he spoke instead to the receptionist, and asked what constituted a threat to the RCMP. When she tried to clarify with him what he wanted, Mr. Sidhu told her: "you are really fucking stupid" and hung up.

[90] Cpl. Dunmall also testified that she received a call from Mr. Sidhu in April 2013. He asked her what constituted a threat from the RCMP. Cpl. Dunmall asked for clarification. Mr. Sidhu replied that he was, at that moment, pulled over by the police. He also said that he had told her what would happen, alluding to a meeting they had on December 2. He ended up hanging up the phone.

[91] Because of their meeting on December 2, 2012, Cpl. Dunmall was concerned that an RCMP member had pulled Mr. Sidhu over, and their safety was at risk. She and another officer tried to track down who might have stopped Mr. Sidhu. Ultimately, they were satisfied that he was not stopped by a police officer, and there was no risk to safety. Mr. Sidhu did not recall making the call.

[92] Mr. Sidhu placed other phone calls to RCMP reception to make complaints. For instance, on August 27, 2013, Mr. Sidhu phoned to complain that an intoxicated woman had been dropped off by an RCMP officer in front of his workplace.

[93] On May 28, 2016, Mr. Sidhu phoned the RCMP and complained that police officers were tailgating in front of him and slowing down intentionally because they recognized him. In both phone calls his tone was belligerent, he swore, and he yelled.

[94] Mr. Sidhu also approached RCMP officers when they were not in uniform, accused them of malfeasance, and insulted them. Cpl. Waldner testified that he encountered Mr. Sidhu when Cpl. Waldner was at McDonald's with his wife and three young children. He said that Mr. Sidhu became hostile, began swearing, and calling the RCMP a bunch of racists and liars. He was acting in such a manner that a bystander asked Cpl. Waldner if he needed assistance. His wife, in accordance with an arrangement Cpl. Waldner had previously made with her if they were to be confronted by someone in public, left with the children, got into the car, and drove to the police detachment.

[95] Aux. Cst. Brooks also stated that on one occasion, when he was in the change room of the Canada Games Centre, he saw Mr. Sidhu there. Mr. Sidhu told him something to the effect of that Aux. Cst. Brooks ruined people's lives and had fun with it.

[96] During cross-examination, Mr. Sidhu admitted to approaching other RCMP officers in a similar fashion.

[97] Some evidence was provided about the effect these interactions had on RCMP members and their families. Cpl. Dunmall had difficulty testifying about the phone call with Mr. Sidhu and explained that it continued to bother her. Cpl. Waldner testified that after his interaction with Mr. Sidhu at McDonald's, his wife would not eat out at restaurants for the rest of the time they lived in Whitehorse.

[98] Eventually, an RCMP officer, Cpl. Monkman, was tasked with monitoring Mr. Sidhu's interactions with the RCMP to determine whether charges could be laid against him. Cpl. Monkman testified that Mr. Sidhu's actions did not give rise to criminal activity, and charges were not laid.

[99] Counsel to Mr. Sidhu argues that Mr. Sidhu's reactions were in response to the RCMP's racism towards him. Being confronted with police racism and racial profiling on a regular basis would be extremely trying. I agree with counsel that this could lead to someone acting in an unusual manner when encountering the police.

[100] Here, however, as set out below, at least in the incidents at issue, I find the police officers named in the statement of claim were not motivated by racism. Moreover, this argument does not explain why Mr. Sidhu would seek out members of the RCMP and engage with them in such an unproductive manner. Additionally, Mr. Sidhu did not testify that his actions were inappropriate. Rather, he believed his responses were suitable. As Mr. Sidhu's own evidence is not consistent with counsel's submissions, I reject this argument.

[101] I conclude that after 2012, there developed a perception that Mr. Sidhu was harassing of RCMP members. I furthermore conclude that Mr. Sidhu's actions were the major reason the RCMP perceived him as harassing.

D. December 2, 2012: Lawfulness of Detention at Check stop

[102] In my analysis on this issue I will address not only what occurred in the December 2 stop, but also will examine the similar fact evidence introduced about a traffic stop conducted on May 16, 2012.

(a) Facts

(i) December 2, 2012

[103] Two RCMP officers who took part in the stop, Aux. Cst. Brooks and Cst. West, testified about the check stop. Aux. Cst. Brooks was a volunteer RCMP officer, and had been for about 19 years at the time of the check stop, although at the time of the trial he had retired. Cst. West is a member of the traffic division of the RCMP, as he was in 2012.

[104] They both described the check stop as a Christmas season check stop. It took place on the evening of December 1, until the early hours of December 2. The purpose of the check stop was to assess drivers for sobriety and road compliance overall, although the priority was sobriety.

[105] Aux. Cst. Brooks explained in his testimony that there were two areas set aside for the check stop. The first was an initial review. Three members of the RCMP, including Aux. Cst. Brooks, conducted the initial review. As the initial review of a car involved only one member, three cars could be stopped at once for this check. If an additional review was needed, then the vehicles would be waved to the second area.

[106] Cst. West and Aux. Cst. Brooks both testified that the number of cars stopped during a check stop depends on the amount of traffic. Light traffic on the road permits the members to stop more cars, while heavier traffic means that fewer cars will be stopped. The RCMP members did not deviate from this practice on December 1-2, 2012.

[107] Soon after midnight on December 2, Mr. Sidhu went through the stop. At that time, traffic was very light. Aux. Cst. Brooks said that he waved two cars ahead of

Mr. Sidhu to be checked by the other members of the initial review group.

Aux. Cst. Brooks checked Mr. Sidhu.

[108] Cst. Aux Brooks also testified that, although he could not confirm that all cars were stopped, the vast majority were. He requested drivers' licences about 50% of the time when other vehicles were not waiting behind.

[109] Although they disagree about some of the details, both Mr. Sidhu and Aux. Cst. Brooks agree in essence about what occurred next. Aux. Cst. Brooks asked Mr. Sidhu to produce his driver's licence. Mr. Sidhu showed him the driver's licence but did not hand it to him. Aux. Cst. Brooks then made a formal demand for the driver's licence. Mr. Sidhu did give Aux. Cst. Brooks his driver's licence at that point and Aux. Cst. Brooks flagged over a regular member for assistance. Cst. West came to the truck and from that point on, Aux. Cst. Brooks did not deal with Mr. Sidhu.

[110] When asked why Aux. Cst. Brooks flagged a regular member over rather than simply allowing Mr. Sidhu to proceed once he had gotten the driver's licence, Aux. Cst. Brooks said that when a driver is reluctant to provide their driver's licence, it could mean that there is a problem, including that the driver's licence could be suspended. He therefore believed that Mr. Sidhu may require secondary screening.

[111] In addition, Aux. Cst. Brooks is a volunteer member of the RCMP, with limited authority. Providing a formal demand was at the limit of his authority. He needed to end his involvement, and pass the matter over to a regular member.

[112] As Cst. West approached the truck, Mr. Sidhu began to film the stop. As seen from Mr. Sidhu's video, Cst. West waved Mr. Sidhu to the secondary area. At that point

as well, the VICS video from a police vehicle was turned on, and that also captured what occurred at the secondary stop.

[113] As the rest of the Mr. Sidhu's stop is recorded, there is much that is not in dispute. Mr. Sidhu got out of the truck and asked why he was being detained. Cst. West explained that it was a check stop and told him he would check Mr. Sidhu's driver's licence.

[114] Mr. Sidhu did drive to the secondary area. While waiting for the check to be completed, he got out of his truck and again asked why he was being detained. He was argumentative with another police officer who tried to explain why the check stop was in place and called him a "fucking racist sack of shit".

[115] Upon returning his documents to him, Cst. West said to Mr. Sidhu: "You were a mayoral candidate, weren't you? You would have done a fine job." This led to a further exchange with Cst. West, wherein Mr. Sidhu said: "Picture your wife, if you have kids, picture them too." After that, Mr. Sidhu got back into his truck and left.

[116] Aux. Cst. Brooks testified that more cars were checked in the initial area while Mr. Sidhu was in the secondary area. Mr. Sidhu testified that other cars were not stopped.

[117] Counsel asked Cst. West why he directed Mr. Sidhu to the secondary stop. He replied that he had some concerns because Aux. Cst. Brooks had to make a lawful demand before Mr. Sidhu would produce his driver's licence, and because he recalled from a previous stop on May 16, 2012, that Mr. Sidhu had 10 demerit points, which was close to the threshold for suspension.

(ii) Similar Fact Evidence, May 16, 2012

[118] As with the December 2, 2012 stop, most of the basic facts are not at issue, as the stop was recorded by the RCMP car's VICS video.

[119] On May 16, 2012, Mr. Sidhu was working with his sister in the family's laundromat business. Cst. West was in his marked RCMP car parked in the parking lot across the street. In his testimony Mr. Sidhu implied that Cst. West had chosen to park in that area to target him.

[120] Cst. West, on the other hand, testified that he frequently parked in the parking lot when he was conducting proactive traffic checks, as the parking lot is deep, and provides a perpendicular view of traffic, which is useful for spotting drivers who are not wearing seatbelts or who are using cell phones.

[121] Mr. Sidhu left the laundromat in his truck, and Cst. West followed. Cst. West testified that part of what drew his attention to Mr. Sidhu was that he saw Mr. Sidhu give him the finger. He then noticed that Mr. Sidhu was not wearing his seatbelt. Cst. West therefore followed him in order to give him a ticket. Mr. Sidhu did not know if he gave Cst. West the finger, but said that he was wearing his seatbelt.

[122] Cst. West put on his police siren sometime after he started following Mr. Sidhu. He explained during his testimony that he waited to put on his lights until there was a safe place for both cars to park. Cst. West testified that he did not know who was driving the truck when he stopped Mr. Sidhu. He further testified that he had some knowledge of Mr. Sidhu.

[123] At one point Cpl. Pollard, Cst. West's supervisor, pulled up as well. Cst. West testified that he did not know why Cpl. Pollard stopped there, although he later

wondered aloud if he had texted him. In the VICS video, Cst. West explained to Cpl. Pollard that he recognized Mr. Sidhu from warnings out of Whitehorse, and that he was “not all there”. Cst. West gave Mr. Sidhu a ticket.

[124] Cst. West later stayed the ticket. He testified that he did so because afterwards Cpl. Pollard explained that on some trucks the positioning of the seatbelt can make it look like a driver was not wearing their seatbelt, even though they were. This, along with Mr. Sidhu’s objections at the time of the stop, left him with a small doubt about whether Mr. Sidhu was wearing a seatbelt. He therefore stayed the ticket.

(b) Analysis

[125] It is common ground that the police have the ability to set up check stops for the purposes of checking sobriety and compliance with motor vehicle laws (*R v Hufsky*, [1988] 1 SCR 621).

[126] If one of the purposes of the stop is improper, however, then the stop is no longer lawful. A stop in which racial profiling plays a part is, therefore, unlawful (*Brown v Durham Regional Police Force* (1998), 43 OR (3d) 223 (CA) at paras. 34-39) and a breach of ss. 9 and 15 of the *Charter*.

[127] Racial profiling has been described by the Supreme Court of Canada in *R v Le*, 2019 SCC 34 at para. 76. It states:

... [T]he concept of racial profiling is primarily concerned with the motivation of the police. It occurs when race or racial stereotypes about offending or dangerousness are used, consciously or unconsciously, to any degree in suspect selection or treatment.

[128] Racial profiling can seldom be proven by direct evidence (*R v Brown* (2003), 64 OR (3d) 161 (CA) at para. 44). The presence of certain indicators can be used to

demonstrate that a police officer engaged in racial profiling. These include: inappropriate behaviour such as questioning or treatment that is harassing or vexatious; contradictory or implausible testimony offered to legitimize a police officer's actions; and differential treatment of some groups in analogous circumstances (*R v Neyazi*, 2014 ONSC 6838 at para. 198).

[129] In *R v Sittladeen*, 2021 ONCA 303 at para. 84, the Court stated:

... [T]he presence of one or more factors consistent with racial profiling does not generate a presumption of racial profiling: *Peart*, at para. 135. A trial judge is required to examine all the evidence, consider the available inferences, and determine what the officers' actual reasoning was.

[130] With regard to the December 2 stop, I understand that Mr. Sidhu's position is that the following factors demonstrate that he was racially profiled: he was treated differently than other drivers because he was stopped when others were not; he was treated in a harassing manner; and the police's reasons for sending him to the secondary stop are not believable.

[131] Whether Mr. Sidhu was stopped while others were not is in dispute. Mr. Sidhu says that they were not, while Aux. Cst. Brooks testified that they were. Counsel to Mr. Sidhu also submitted that the VICS video shows that other cars were not stopped.

[132] Aux. Cst. Brooks' evidence was specific and detailed. He sought to provide accurate testimony, and provided thorough explanations when tested by Mr. Sidhu's counsel. I find Aux. Cst. Brooks credible.

[133] On the other hand, I have difficulty accepting Mr. Sidhu's testimony. During the stop, as noted in Mr. Sidhu's video and the VICS video, Mr. Sidhu was focused on his own situation. At times, as well, he was seated in his truck, where he would not have

been able to see with clarity whether other cars were stopped. As his attention was distracted, I find that his ability to observe whether cars were being stopped was impaired. This diminishes his reliability.

[134] Contrary to Mr. Sidhu's counsel's submission, moreover, it cannot be seen from the VICS video where the initial screening area starts and stops. All that can be seen is that there are cars driving through. Aux. Cst. Brooks testified that the initial screening area was behind the area captured by the VICS video. Based on Aux. Cst. Brooks' evidence, therefore, I conclude that when Mr. Sidhu was stopped, two other cars were stopped as well. Once Mr. Sidhu moved into the secondary screening area, other cars were also stopped.

[135] There is also no evidence that Aux. Cst. Brooks recognized Mr. Sidhu's truck or Mr. Sidhu, or that he saw that Mr. Sidhu was a person of East Indian descent when he waved him down to stop him. The determination to stop him, therefore, was based on chance, and not on the colour of his skin.

[136] Mr. Sidhu's counsel also submits that Cst. West's decision to send Mr. Sidhu to secondary screening shows that he was treated differently than others. Additionally, Cst. West's reasons for sending him to secondary screening was because of Cst. West's malice against Mr. Sidhu.

[137] Cst. West testified that his suspicions were aroused because Aux. Cst. Brooks had to make a formal demand for Mr. Sidhu's driver's licence. Upon recognizing Mr. Sidhu as well, he recalled that Mr. Sidhu had 10 demerit points when he had seen him last. As Mr. Sidhu was close to being suspended from driving, Cst. West directed him to secondary screening.

[138] On cross-examination he maintained that he sent Mr. Sidhu to secondary screening because of the number of demerit points. He stated: "I would not be doing my job if I didn't check with 10 demerit points." Mr. Sidhu did not suggest in his evidence that he had less than 10 demerit points. On the face of it, Cst. West's explanation is reasonable.

[139] That Cst. West made a disparaging remark at the end of the interaction is a factor that could lead me to conclude that he had racial bias. Cst. West's explanation for his remark was that he was trying to point out to Mr. Sidhu that his actions during the stop were inconsistent with someone who had mayoral aspirations.

[140] I do not condone Cst. West's actions. As he himself stated, his response was unprofessional. The claim here, however, is not that Cst. West acted unprofessionally, but that he was motivated by racism.

[141] Considering Mr. Sidhu's actions that night, I accept that Cst. West could have reacted out of frustration and not because of racism.

[142] I must also consider the similar fact evidence. If I were to determine that the May 16, 2012 stop was marred by racism, this could impact on my ultimate assessment of Cst. West's testimony with regard to the December 2 check stop.

[143] As I see it, the factors that could show the May 16 stop was racially motivated are that: Cst West was targeting Mr. Sidhu by sitting in his patrol car across the street from Mr. Sidhu's work; he followed him some distance before turning on the siren; Cpl. Pollard pulled over at the stop while Cst. West was giving him a ticket; and that after the ticket was issued, it was stayed.

[144] Cst. West readily admitted that he was parked in a parking lot across the street from the laundromat where, it turned out, Mr. Sidhu worked. As a member of the traffic division, his role was to look for motor vehicle infractions. His unchallenged evidence was, moreover, that he was parked in front of Mr. Sidhu's workplace because he was able to see traffic from a perpendicular angle, and thus would be able to see drivers who were on their cell phones or not wearing their seatbelts.

[145] Furthermore, Mr. Sidhu caught his attention, partially, because he gave Cst. West the finger. Mr. Sidhu said that he did not recall if he gave Cst. West the finger, but that he regularly hooks his middle finger on the window, which may make it appear that he is showing his middle finger.

[146] In the end it does not matter whether Mr. Sidhu was actually giving Cst. West the finger or not. The reason this is material is because Cst. West explained that it was part of the reason that his attention was drawn to Mr. Sidhu. Mr. Sidhu himself testified that it could look like he was giving the finger as he was driving. His testimony therefore supports the conclusion that Cst. West was not targeting him, but noticed him because of this apparent rude gesture.

[147] Cst. West further testified that he did not put his sirens on immediately, but waited until there was a spot where it would be safe for the two vehicles to stop. He was not challenged on this.

[148] He was questioned about when his VICS video turned on. He said the system functioned such that the camera began recording thirty seconds before he turned on his police lights. Mr. Sidhu's counsel submitted the VICS video did not turn on 30 seconds before Cst. West turned on the lights and asks me to draw a negative inference

because of this. However, the VICS video shows that thirty seconds after the video begins, Cst. West briefly turned his sirens on, then off. A little later, he turned them on again and left them on. Cst. West's testimony is not inconsistent with the video.

[149] Cst. West testified that he did not know that the person he stopped was Mr. Sidhu until he began to interact with him. Mr. Sidhu's counsel takes issue with this evidence, saying that the VICS video shows that Cst. West did recognize Mr. Sidhu. The VICS video is not inconsistent with Cst. West's evidence. It shows that, after he and Mr. Sidhu had been talking for a while, Cst. West said that he recognized Mr. Sidhu. There is no evidence that Cst. West recognized Mr. Sidhu when he decided to stop him.

[150] Cst. West testified that he did not ask for back up, but then mused that he may have texted Cpl. Pollard. This could be an indication of racial profiling, but whether he did contact Cpl. Pollard, or why, was not explored any further.

[151] Furthermore, Cst. West could have been cross-examined on his remark to Cpl. Pollard that Mr. Sidhu was "not all there", as that could lend some credence to Mr. Sidhu's theory that Cst. West had *animus* against Mr. Sidhu. He was not however, and his testimony that although he knew of Mr. Sidhu but that he did not know much about him and that "he didn't mean anything to me" went unchallenged.

[152] Having regard to the VICS video and the testimony as a whole, I conclude that Cst. West acted appropriately. I do not conclude that Cst. West was racially profiling Mr. Sidhu during the stop on May 16, 2012.

[153] Taken together, the evidence demonstrates that Mr. Sidhu was not targeted at either the initial or secondary screening of the December 2, 2012 stop. He was stopped as part of an organized check stop, the purpose of which was to check for sobriety and

road compliance. The RCMP members' questions and actions, moreover, were almost exclusively confined to issues of sobriety and road compliance.

[154] Mr. Sidhu was directed for further screening because of reasonable concerns over his actions and his driving record. The stop was brief. Although Cst. West made a remark that could show racial bias, I find that it was an utterance made in the heat of the moment, out of frustration over the situation, and did not have racist intent.

[155] The May 16, 2012 stop also does not lend support to Mr. Sidhu's position that Cst. West was acting out of *animus*. Taking into account the totality of the circumstances, I conclude that the December 2, 2012 stop was lawful.

E. December 5, 2012

I. Malicious Prosecution

(a) Facts

[156] As soon as Mr. Sidhu left the check stop on December 2, 2012, he called the RCMP and said that he had been verbally assaulted by a police officer. He then hung up. As a result of this call, an RCMP officer, Cpl. Dunmall, called him back approximately an hour later. By the time Cpl. Dunmall phoned him back it was very late. They therefore agreed that he would come in to the RCMP office the evening of December 2 to speak with her.

[157] As they had arranged, Mr. Sidhu went to the police station and he and Cpl. Dunmall talked for about an hour. Their descriptions of what occurred are quite different.

[158] Mr. Sidhu's description of the meeting was that he went to file a complaint, and perhaps get a restraining order or peace bond against Cst. West. Mr. Sidhu testified that

he and Cpl. Dunmall viewed the video he had taken of the check stop the night before, talked about pop culture, and he mentioned the phrase from the TV show *The Family Guy*, “bullets sound the same in any language”.

[159] Mr. Sidhu testified that he told Cpl. Dunmall that he was seeking a restraining order and to file complaint. He explained that he was afraid that the RCMP were trying to harm him. Mr. Sidhu testified that he said, “I’m afraid there is going to be a body on the ground, and I don’t carry a gun.” When Cpl. Dunmall asked him to clarify, Mr. Sidhu said that he was afraid that if there was a physical altercation, then one of them was going to get hurt, and that he did not carry a gun. In his testimony, Mr. Sidhu explained that the implication of the statement was that he was concerned about being hurt.

[160] Later, when his counsel asked him if there was discussion about a police officer getting shot, Mr. Sidhu stated that the implication of saying that “one of them was going to get hurt, and I didn’t carry a gun” was that the police officer could get hurt as well. He denied saying anything about punching a police officer, grabbing his gun and shooting him in the face, or naming Cst. West specifically.

[161] In her testimony, Cpl. Dunmall agreed that when they met, she and Mr. Sidhu watched his video of the check stop. She also agreed that Mr. Sidhu quoted from *The Family Guy*, but said that Mr. Sidhu said “bullets have no names”.

[162] Cpl. Dunmall’s description of the conversation diverges significantly from Mr. Sidhu’s after that. She testified that she asked him if he wanted to file a complaint, and he said that she could put it in her “little report”.

[163] In addition, he asked her what would occur if he punched a police officer in the face, grabbed his gun, and shot him in the face. When Cpl. Dunmall tried to clarify,

Mr. Sidhu said that he was speaking in the “hypothetical”. At the end of the conversation, Mr. Sidhu told her that if Andrew West pulled him over there would be a body on the ground, that she had been warned, and it would be on her.

[164] Cpl. Dunmall did not take notes during the meeting, but testified that she did write up notes soon after the meeting.

[165] She testified that the meeting left her questioning what had occurred. She understood that Mr. Sidhu’s words met the usual standard for charges for threats, but wondered whether there was a higher threshold for police officers.

[166] Before the end of her shift, Cpl. Dunmall sent the description of her meeting with Mr. Sidhu to a senior officer. Cpl. Dunmall finished her shift and went home to start her days off. She was recalled to work, however, and questioned about why she had not laid charges right away. During testimony, Cpl. Dunmall explained that she told her superiors that she was unsure whether charges were appropriate, and that she wanted to be able to think about the circumstances more before proceeding with the charge. Over the next day or two she dealt with the matter. Cpl. Dunmall asked the Crown Prosecutor whether there were grounds for arrest; the Crown stated there were. On that basis, she drew up the information charging Mr. Sidhu.

(b) Analysis

[167] In order to establish that he was maliciously prosecuted, Mr. Sidhu must prove four things: that the prosecution at issue was initiated by the defendant; that it was terminated in the plaintiff’s favour; that the proceedings were instituted without reasonable cause; and, that the defendant was actuated by malice (*Miazga v Kvello Estate*, 2009 SCC 51 (“*Miazga*”) at para. 3).

[168] In this case, the first two elements of the test are not contentious. The defendant initiated the proceedings and Mr. Sidhu was acquitted at trial. The real issues here are whether the proceedings were instituted with reasonable cause, and whether Cpl. Dunmall was actuated by malice.

[169] Reasonable cause is established if the defendant who laid the charge personally believed there was reasonable cause and the belief was reasonable in the circumstances (*Miazga* at para. 58). The subjective element is not concerned with the defendant's personal views about the accused's guilt, but with their professional assessment of the legal strength of the matter (para. 63).

[170] Malice is demonstrated if the plaintiff can show that the defendant "...was in fact motivated by an improper purpose" (para. 85).

[171] Ordinarily it is necessary first to determine whether there was reasonable cause before determining malice. If the court finds that there was reasonable cause, then the analysis ends there and the court should not embark on an analysis of whether there was malice (para. 55).

[172] Here, however, reasonable cause and malice are inextricably linked. Mr. Sidhu submits that Cpl. Dunmall wanted to pursue a conviction against him, as the RCMP had been dealing with Mr. Sidhu for years and disliked his confrontational attitude. They had not, up until that point, been able to get a conviction and he was the proverbial thorn in their side. Cpl. Dunmall saw this as the opportunity to stop Mr. Sidhu by pressing charges.

[173] Mr. Sidhu is not saying that the statements, as described by Cpl. Dunmall, do not establish reasonable cause. I conclude, based on these submissions and the evidence

advanced, that Mr. Sidhu's theory is that Cpl. Dunmall falsified the statements against him and pressed charges on the basis of these statements.

[174] Here, then, the determination of whether there was reasonable cause is dependent on the finding that Cpl. Dunmall was motivated by an improper motive and that she fabricated the statements that led to the charges. In these circumstances, therefore, I will first determine whether Cpl. Dunmall had malice.

[175] Mr. Sidhu's testimony about his meeting with Cpl. Dunmall does not have some of the issues that his other testimony has. On the face of it, his testimony is consistent. Nonetheless, because of the various concerns I have noted with his evidence, I approach his testimony with caution.

[176] Cpl. Dunmall's testimony is also problematic. For instance, there were times when she did not answer the question posed of her, but rather, seemed to respond to a different question. This suggests that Cpl. Dunmall was defensive when giving parts of her testimony.

[177] In other ways Cpl. Dunmall was credible. She was able to discuss some of the key statements that Mr. Sidhu made and provide context about them, despite being vigorously cross-examined by Mr. Sidhu's counsel.

[178] Moreover, documentary evidence and the testimony of other witnesses assist my assessment. While some of this evidence contradicts that of Cpl. Dunmall, it still leads me to conclude that Cpl. Dunmall did not have *animus* against Mr. Sidhu and did not misstate what he said.

[179] At trial, Cpl. Dunmall stated that she did not know much about Mr. Sidhu before she talked to him on December 2, 2012. She stated that she had spoken briefly with

Cst. West about a motorist that had been difficult at the check stop before she spoke to Mr. Sidhu by phone. She said that this conversation occurred during a chance meeting in the bullpen of the Whitehorse detachment. She also said that she did not recall that Mr. Sidhu's name was used during the conversation. Other than that, the substance of her testimony was that she had had no knowledge of Mr. Sidhu before meeting him.

[180] Other evidence, however, shows that Cpl. Dunmall was incorrect in some of her testimony. In his cross-examination, Cst. West agreed with Mr. Sidhu's counsel when it was put to him that Cpl. Dunmall had called him before meeting Mr. Sidhu. Moreover, Cpl. Dunmall stated in her Supplementary Occurrence Report, dated December 2, 2012:

Writer had had conversation with Cst. West whom [as written] indicated that Sidhu had approached him at a check stop with a recording device and was making vaguer [as written] comments about members and members [as written] wives. This is why the writer knew of Sidhu's personal recording.

[181] Cpl. Dunmall therefore likely spoke to Cst. West on the phone, rather than in-person, and Cst. West likely used Mr. Sidhu's name during the conversation. However, Mr. Sidhu's lawyer did not ask Cst. West what he and Cpl. Dunmall spoke about. There is therefore no evidence that Cst. West, and Cpl. Dunmall spoke of anything other than the check stop, nor that they spoke about it at any great length.

[182] Cpl. Dunmall also denied knowing anything about Mr. Sidhu or hearing anything about him from her colleagues, aside from Cst. West, before meeting him. Mr. Sidhu's lawyer takes issue with this and points out that Aux. Cst. Brooks testified that there had been casual conversation about Mr. Sidhu's run for mayor at the RCMP. Mr. Sidhu's

counsel therefore submits that I should conclude that there had been discussions about Mr. Sidhu within the RCMP around Cpl. Dunmall and that she knew of him.

[183] Having found that Mr. Sidhu was not a frequent topic of conversation within the RCMP, I conclude that Cpl. Dunmall's testimony is consistent with that of the other witnesses. Therefore, I conclude that she did not hear about Mr. Sidhu from her fellow officers except that which she learned from Cst. West.

[184] Mr. Sidhu's lawyer also questioned Cpl. Dunmall about whether she reviewed documentation that concerned Mr. Sidhu before meeting him, such as his CPIC. She denied this.

[185] Even if I were to conclude that Cpl. Dunmall did check Mr. Sidhu's CPIC before meeting him, nothing turns on it. No evidence was lead about what Cpl. Dunmall would have seen upon reviewing his CPIC. Mr. Sidhu's CPIC of other dates was filed, but no submissions were made about what Cpl. Dunmall would have seen in CPIC.

[186] In addition, Mr. Sidhu's lawyer questioned Cpl. Dunmall about a document called a "PROS Report" and about the Bulletin that was written on December 3, 2012. Like the Bulletin, the PROS Report portrays Mr. Sidhu as unstable and violent. It also contains historical and current information about Mr. Sidhu, including information about his interactions with the RCMP in Watson Lake. While the Bulletin was created on December 3, 2012, the first PROS Report was drafted December 4, 2012.

[187] Cpl. Dunmall did review these documents. It can be concluded that Cpl. Dunmall's perception of Mr. Sidhu was shaped by them.

[188] However, these documents do not assist Mr. Sidhu's position that Cpl. Dunmall fabricated statements and attributed them to Mr. Sidhu because she was set on

charging him. These documents were written after Cpl. Dunmall met Mr. Sidhu and wrote the Supplementary Occurrence Report, which contained the summary of Cpl. Dunmall and Mr. Sidhu's meeting, and which was the basis upon which the charges were laid.

[189] The Supplementary Occurrence Report is not time stamped. However, an email from her superior, Sgt. Tom Wyers, which was written at 7:30 a.m. on December 3rd, and which discussed the Supplementary Occurrence Report was copied and pasted into the Supplementary Occurrence Report (the Supplementary Occurrence Report was continued as a running document after Cpl. Dunmall wrote her summary of her meeting with Mr. Sidhu).

[190] This confirms Cpl. Dunmall's testimony that she wrote the Supplementary Occurrence Report during her overnight shift on December 2-3, 2012, and provided it to her superiors before going home on December 3, 2012.

[191] The documents which contain details about Watson Lake, and which Mr. Sidhu takes issue with, were created after 7:30 a.m. on December 3rd. They did not exist at the time that Cpl. Dunmall allegedly had the *animus* against Mr. Sidhu: they could not have created or contributed to this *animus*.

[192] I therefore conclude that, at the time she wrote the Supplementary Occurrence Report, Cpl. Dunmall had very little knowledge of Mr. Sidhu and no reason to have *animus* against him.

[193] Moreover, Cpl. Dunmall's correspondence with her superiors, which was filed as evidence, shows, contrary to Mr. Sidhu's argument, that Cpl. Dunmall carefully considered whether Mr. Sidhu should be charged, including whether there were

reasonable grounds to charge him and about some of the ramifications that could arise from the charges. This establishes not only lack of malice, but also reasonable cause.

[194] Cpl. Dunmall did not arrest Mr. Sidhu at the end of their meeting. Instead, she wrote the matter up as the Supplementary Occurrence Report. Her superior, Sgt. Wyers, reviewed and then wrote a message at 7:30 a.m. on December 3, 2012, that stated:

I think this guy should have been arrested and possibly even show caused. Perhaps even arrested under the MHA for being a danger to public.

Dunmall says the inference is there....holy crap these are serious "inferences".

[195] Cpl. Dunmall testified that she was recalled from her days off to deal with this matter, and was asked to explain why she had not arrested Mr. Sidhu. I take from her testimony, as well as the documentary evidence, that Cpl. Dunmall's superiors were pressing her to act, and thought she should have acted more quickly and decisively.

[196] Despite her superiors' opinions, Cpl. Dunmall did not immediately press charges. On December 4, 2012, Cpl. Dunmall wrote the following in the Supplementary Occurrence Report:

In this manner, the writer believes that SIDHU has made a conditional threat, which in *R v ROSS* (1986) constitutes an offence of S.264.1 c.c. That being said, it is the writer [as written] respectful opinion that a conversation be had with the Department of Public Prosecutions about the prospect of conviction, prior to the laying of a charge, for reasons the writer details below.

Insight:

From the conversation with SIDHU the writer can say with certainty that SIDHU if charged and not convicted, would see himself as above reproach and would be more dangerous

towards police. The writer is not saying that we don't lay charges when warranted. Just in this particular instance, with this individual, there needs to be more than a reasonable prospect of conviction. Essentially, we will be giving SIDHU what he wants, a grandstand with the police, and one that if he should win, troubles me.

[197] Counsel to Mr. Sidhu cross-examined Cpl. Dunmall about her use of the words “dangerous” and “troubles me.” Mr. Sidhu’s lawyer suggested that it was problematic that Cpl. Dunmall thought that Mr. Sidhu might be more dangerous, or that his potential acquittal might trouble her. Here again, Cpl. Dunmall had difficulty answering counsel’s questions and appeared defensive.

[198] These paragraphs were written after Cpl. Dunmall had learned more information about Mr. Sidhu. They do suggest that Mr. Sidhu could pose a risk to the RCMP and that Mr. Sidhu might be dangerous. Cpl. Dunmall’s attempts to distance herself from these statements during her testimony is unconvincing.

[199] However, I believe that these paragraphs also do not support Mr. Sidhu’s theory that Cpl. Dunmall trumped up a charge against Mr. Sidhu because she considered him to be a problem to the RCMP. They in fact support the opposite conclusion. These paragraphs show that Cpl. Dunmall agreed that there were sufficient grounds to charge Mr. Sidhu. However, she was hesitant about charging him, as she was worried that, if acquitted, Mr. Sidhu could become more dangerous to the police. She therefore advocated for a higher threshold than “a reasonable prospect of conviction” in order to charge him.

[200] In addition, before deciding to lay the charge, Cpl. Dunmall consulted with a Crown Prosecutor, who confirmed there was reasonable cause.

[201] Reasonable cause has both a subjective and objective element to it. The objective element is met because Cpl. Dunmall did not fabricate any statements and Mr. Sidhu does not challenge that the statements, if true, give rise to reasonable cause.

[202] The subjective element is also met. Cpl. Dunmall may have had concerns about the wisdom of charging Mr. Sidhu, but her professional assessment, supported by the Crown prosecutor, was that there were reasonable and probable grounds to charge Mr. Sidhu.

[203] The evidence therefore leads me to conclude not only that Cpl. Dunmall had very little information about Mr. Sidhu, and therefore no malice, but that she also had reasonable cause to charge him.

[204] There is no basis upon which to conclude that Mr. Sidhu was maliciously prosecuted.

II. Lawfulness of Arrest

(a) Facts

[205] On December 5, 2012, Cpl. Waldner, Cst. Legett, Cst. Seidemann and Cst. Carr attended the laundromat where Mr. Sidhu worked, and which is owned by his family, in order to arrest him.

[206] Cpl. Waldner, who was the RCMP officer in charge of the arrest that day, gave testimony at trial. He testified that he satisfied himself that there were reasonable and probable grounds for Mr. Sidhu's arrest on December 5, 2012, by reviewing the investigation file prepared by Cpl. Dunmall.

[207] Before the arrest, Cpl. Waldner turned on his audio recording equipment. As such, the arrest was audiotaped; many of the facts about the arrest while the parties were at the laundromat are not in dispute.

[208] Cpl. Waldner and Cst. Seidemann entered the laundromat to effect the arrest, while Cst. Leggett and Cst. Carr remained at the police car. Mr. Sidhu was there, as was his sister, Sukhdip Sidhu. Mr. Sidhu was quickly arrested.

[209] Upon his arrest, Mr. Sidhu asked to speak with a lawyer. It is uncontroverted that Mr. Sidhu's lawyer's phone number was easily available. Mr. Sidhu was not given the opportunity to speak to his lawyer at the laundromat, but rather, was taken out to the police car.

[210] He was read his rights and Mr. Sidhu continued to ask repeatedly to speak to his lawyer. Mr. Sidhu's father came to the police car and one of the police officers got Mr. Sidhu's lawyer's information from Mr. Sidhu's father. He was then taken to the courthouse.

[211] The one point of contention is about whether Mr. Sidhu's father was at the laundromat when the police arrived, or if Ms. Sidhu called him when Mr. Sidhu was arrested and arrived shortly afterwards. Ms. Sidhu, who testified at trial, recalls calling her father upon Mr. Sidhu's arrest. Cpl. Waldner recalls that Mr. Sidhu's father, another East Indian man, Mr. Sidhu, and Ms. Sidhu were at the laundromat when they arrived. I infer from his testimony that Cpl. Waldner assumed the individuals were employed or connected to the owners of the laundromat. Based on Ms. Sidhu's recollection, and on evidence about what occurred at the police car, I conclude that Mr. Sidhu's father was

not at the laundromat when the police arrived, but came soon after. I also conclude that the only people in the employee area were Mr. Sidhu and Ms. Sidhu.

[212] As soon as Mr. Sidhu was placed in the police car, the VICS video was turned on and remained on while Mr. Sidhu was taken to the courthouse. The video was introduced as evidence, although its authenticity was disputed.

[213] Cst. Leggett drove Mr. Sidhu to the courthouse. Unlike the arrest itself, the material facts about Cst. Leggett's and Mr. Sidhu's interactions are in dispute.

[214] At one point, Cst. Leggett stepped on the brake and Mr. Sidhu hit his head on the partition between the front and back seat. In the VICS video Mr. Sidhu is heard to exclaim that Cst. Leggett slammed his brakes on purpose. Cst. Leggett states in the video that Mr. Sidhu hit his head on purpose.

[215] In direct examination, Mr. Sidhu explained that he hit his head because of the position he was seated in when Cst. Leggett pressed the brakes. In cross-examination, he said that Cst. Leggett caused him to hit his head when he slammed on the brakes.

[216] Cst. Leggett, who testified at trial, said that he was going no more than 20-30 kilometres per hour when he braked and Mr. Sidhu hit his head. He believed that Mr. Sidhu hit his head on purpose, because he hit his head after Cst. Leggett finished braking.

[217] The car then entered the cell block bay of the courthouse. At that point, Mr. Sidhu was complaining loudly about the pain. He admitted on cross-examination that he had been "embellishing" the amount of pain he had suffered.

[218] Once parked, Cpl. Waldner testified that Mr. Sidhu was briefly left in the car while another detainee spoke to a lawyer in the room used for detainees to speak with counsel.

[219] Cst. Leggett then helped Mr. Sidhu out of the car by taking Mr. Sidhu's arm. Cst. Leggett testified that he did this because it is difficult for handcuffed people to get out of the police car and to maintain control over Mr. Sidhu. Mr. Sidhu testified that he took a hold of him on the bicep, while Cst. Leggett said that he held him closer to the armpit.

[220] Once out of the car, Mr. Sidhu testified that Cst. Leggett dug his nails into his bicep very hard.

[221] Cst. Leggett testified that he did not pinch Mr. Sidhu. He states that he was, in fact, not holding him hard enough, as Mr. Sidhu was able to break away from Cst. Leggett.

[222] Cpl. Waldner was at the courthouse and standing approximately 10 feet away from Mr. Sidhu and Cst. Leggett when Mr. Sidhu got out of the police car.

Cpl. Waldner's testimony was similar to Cst. Leggett's. Upon Mr. Sidhu crying out, Cpl. Waldner said he stepped in and took over from Cst. Leggett.

[223] Once in the courthouse, Cpl. Waldner turned the audio recording on again. He testified, and the audio confirmed, that he arranged for Mr. Sidhu to speak with his lawyer immediately after Mr. Sidhu was brought into the courthouse. Mr. Sidhu was able to speak with counsel within 20-30 minutes of his arrest.

[224] Mr. Sidhu asked Cpl. Waldner to take pictures of the injury to his arm that Cst. Leggett had allegedly caused. He was taken to court first. After his appearance,

Cpl. Waldner took pictures of Mr. Sidhu's arm and Mr. Sidhu was released from custody.

(b) Analysis

(1) Reasonable and Probable Grounds and Discrimination

[225] It appears, for the most part, that Mr. Sidhu's claim that his arrest was unlawful rests on the submission that the charge of uttering threats was without reasonable and probable grounds. As I have found that there were reasonable and probable grounds for arrest, the arrest was not unlawful on that basis.

[226] Mr. Sidhu also seems to submit that, in effecting the arrest, Cpl. Waldner was motivated by racism. Counsel to Mr. Sidhu pointed out that Cpl. Waldner identified the race of three individuals, aside from Mr. Sidhu, as being of East Indian descent, but did not notice anyone else's race.

[227] However, no evidence was provided about the other individuals in the laundromat. There is therefore no evidence that Cpl. Waldner differentiated the individuals he identified from the other individuals on the basis of skin colour.

[228] Aside from that, while there are circumstances in which identifying an individual on the basis of race is racist or based on stereotypes, doing so can also be neutral. Much turns on the context of the comment. In this case, Mr. Sidhu's counsel chose not to cross-examine Cpl. Waldner on his statement, nor presented any other arguments as to why, in these circumstances, Cpl. Waldner's reference to race would be racist.

[229] I am not prepared to read-in racist intent in these circumstances. I conclude that there was no conscious or unconscious bias on his part.

[230] Finally, my understanding is that Mr. Sidhu's lawyer submits that because Mr. Sidhu was taken directly to the courthouse rather than to the RCMP detachment, as would normally occur, that this was another way of targeting Mr. Sidhu or shows racist intent. However, taking him directly to the courthouse rather than first to the detachment and then to the courthouse shortened the amount of time Mr. Sidhu was in custody. This was a benefit to him. I fail to see how it amounted to discrimination.

[231] I conclude that there were reasonable and probable grounds to arrest Mr. Sidhu and that there was no targeting of him nor racist intent.

(2) Right to Counsel

[232] Section 10(b) of the *Charter* guarantees an individual the right to retain and instruct counsel without delay. The police must therefore provide the detainee with the opportunity to speak with counsel immediately upon being detained. However, the immediacy requirement is subject to concerns for police or public safety, or if the police cannot provide the detainee with the ability to speak with counsel in private (*R v Suberu*, 2009 SCC 33 at paras. 37 and 42). The detainee may waive the right to speak to a lawyer in private.

[233] Mr. Sidhu had access to a telephone at the laundromat, had his lawyer's telephone number, and stated he wanted to speak with a lawyer. He was only allowed to speak to a lawyer when he was taken to the courthouse, however. He was therefore not permitted to speak with his lawyer immediately.

[234] As such, the defendant must show that the police had reasonable concerns for their safety, the safety of the public, or that they could not provide for Mr. Sidhu to speak

to a lawyer in private in order to justify the delay in providing him the opportunity to speak with a lawyer.

[235] It was Cpl. Waldner's decision to wait until they reached the courthouse to give Mr. Sidhu the opportunity to speak with counsel. In his testimony, he stated that one of the reasons he did not allow Mr. Sidhu to speak with a lawyer immediately was because he could not give Mr. Sidhu privacy.

[236] He also testified that there were concerns about safety. This was because the individuals in the private area of the laundromat appeared heightened and might involve themselves in the arrest. He furthermore considered the nature of the charges Mr. Sidhu was facing and Mr. Sidhu's history. He also knew that Mr. Sidhu was a strong person, so the police wanted to handcuff him and contain him as soon as possible.

[237] As well, Cpl. Waldner was concerned about other risks. He testified that, in a business area there could be rulers, pens, and scissors, all of which could be used as weapons. Given this, there was a risk both to officer safety and the public if Mr. Sidhu was permitted to speak with a lawyer at the laundromat.

[238] It has been established that the only person on the employee side of the laundromat at the time of the arrest other than Mr. Sidhu was Ms. Sidhu. Cpl. Waldner was therefore mistaken when he testified that there were three other individuals aside from Mr. Sidhu in the private area of the laundromat. Therefore, Cpl. Waldner's testimony that he assessed some risk from the people on the private side of the laundromat is flawed. As a result, I do not take this part of his testimony into account.

[239] However, Cpl. Waldner's uncontroverted evidence was that he could not provide Mr. Sidhu privacy while Mr. Sidhu spoke with his lawyer. Although Mr. Sidhu could have

waived the right to speak to a lawyer in private, he did not testify he would have been willing to waive that right had he had the opportunity to do so.

[240] In addition, Cpl. Waldner's explanation that because office supplies such as pens and scissors could be used as weapons, and because of the nature of Mr. Sidhu's charges, he considered it unsafe to permit Mr. Sidhu to speak with a lawyer at the laundromat, is reasonable.

[241] I therefore find that the Cpl. Waldner reasonably delayed Mr. Sidhu's ability to speak with a lawyer because Mr. Sidhu could not speak with a lawyer privately and because of the risk to the safety of police and the public.

[242] Cpl. Waldner testified that Mr. Sidhu had to wait a few minutes in the patrol car after he arrived at the courthouse. However, as soon as possible, Mr. Sidhu was escorted into a room where he could have privacy, contact was made with his lawyer, and he was able to speak with his lawyer. The time between his arrest and when he spoke with his lawyer was approximately 20-30 minutes. I find that the police provided Mr. Sidhu with the opportunity to speak with a lawyer at the earliest opportunity. His s. 10(b) rights were, therefore, not violated.

(3) Assault

[243] The determination of this issue depends on the facts, and thus, on the credibility of the witnesses who testified on this point: Mr. Sidhu, Cst. Leggett, and Cpl. Waldner.

[244] As the VICS video was turned on during the car ride, it could also provide assistance in determining the facts. In his submissions, however, counsel to Mr. Sidhu took issue with the authenticity of the VICS video of Mr. Sidhu's arrest. He noted that

the metadata showed that the video had been modified at 6:04 a.m. on December 5, 2012.

[245] The question of authenticity was raised for the first time at trial. Mr. Sidhu's counsel indicated that Mr. Sidhu had only begun questioning the video's authenticity when he viewed it while testifying.

[246] Mr. Sidhu's counsel admitted to the video's authenticity, subject to cross-examination of Cst. Legett. When asked on cross-examination, Cst. Legett stated that he did not know why the video showed that it had been modified the morning of December 5, 2012. He also testified that the video appeared as he remembered the events to have taken place.

[247] In *R v Ball*, 2019 BCCA 32, the Court of Appeal for British Columbia explained the requirements of authentication, stating, at para. 70:

...The burden of proof is on the tendering party and the threshold is low: is there evidence, direct or circumstantial, to support a finding that an electronic document is what the tendering party claims it to be? If so, the document is adequately authenticated...

[248] In the case at bar, authenticity was admitted subject to cross-examination.

Mr. Sidhu had watched the video before trial, but took no issue with it until after the trial started. Cst. Leggett testified that the video corresponded with his memory. The modifications which Mr. Sidhu's counsel submits calls authenticity into question were made roughly six hours before Mr. Sidhu's arrest. I do not see how this modification could have an impact on the authenticity of the video at the time of the arrest. I have no difficulty accepting the authenticity of the video.

[249] Turning to the evidence, in the video, Mr. Sidhu blames Cst. Leggett for slamming on the brakes and causing him to hit his head. In direct examination, Mr. Sidhu explained that it was because of the position he was sitting in that he hit his head and did not claim that Cst. Leggett slammed on the brakes. In cross-examination, he agreed that it was because Cst. Leggett slammed on the brakes that he hit his head. Mr. Sidhu therefore seesawed back and forth about what caused him to hit his head.

[250] Mr. Sidhu also stated that he “embellished” the extent to which his head hurt. Given that Mr. Sidhu admitted to being untruthful, I am also very cautious about his testimony as to how he hit his head.

[251] Cst. Leggett testified that at the time he was driving, he was going about 20-30 kilometres per hour. He said that he believed that Mr. Sidhu hit his head after he finished braking and did it on purpose. The incident occurred in a very brief space of time and while Cst. Leggett was occupied with driving. I am not convinced that Cst. Leggett would be able to know when, during the course of braking, Mr. Sidhu hit his head.

[252] Cst. Leggett also explained that whenever the brake is pressed in the police vehicle the letter “B” shows up at the bottom of the video. During the course of the video, “B” does flash on the screen from time to time. The “B” also appears on screen at the time Mr. Sidhu hit his head. It shows that the brake was pressed for about four seconds before Mr. Sidhu hit his head. It even seems that Mr. Sidhu hit his head after Cst. Leggett had finished braking. As Mr. Sidhu hit his head after Cst. Leggett began braking, and likely even after he stopped braking, I conclude that Mr. Sidhu hit his head on purpose.

[253] This taints his testimony about the alleged assault. I do not find Mr. Sidhu credible or reliable with regards to whether he was assaulted by Cst. Leggett.

[254] On the other hand, Cst. Leggett's testimony was clear and detailed. He explained why he put his hand under Mr. Sidhu's arm when he assisted him out of the car. He also described that he put his arm under Mr. Sidhu's armpit, in accordance with his training, rather than on the bicep, as Mr. Sidhu claimed. He noted that he in fact did not keep hold of Mr. Sidhu hard enough, as Mr. Sidhu was able to break free. I recognize that there is more motivation to misstate evidence in situations where, such as here, there is an accusation of assault. I have, as a result, scrutinized Cst. Leggett's evidence carefully. In the end, I find that Cst. Leggett provided credible testimony.

[255] Cpl. Waldner's evidence was similar to Cst. Leggett's. I believe that Cpl. Waldner gave his honest recollection of the alleged assault. However, I am also not convinced that Cpl. Waldner would be able to observe with clarity what happened. I therefore do not put any weight on his evidence on this issue.

[256] It is not disputed that Mr. Sidhu had an injury on his bicep. Mr. Sidhu testified that he did not have that injury before he was arrested. However, because I have found that Mr. Sidhu is not credible or reliable, I put no weight on this evidence. There is, therefore, evidence that Mr. Sidhu had an injury on his arm, but this does not show how he got the injury.

[257] I find that Mr. Sidhu was not assaulted by Cst. Leggett.

F. June 4, 2016: Lawfulness of Detention at Check Stop

(a) Facts

[258] There is very little dispute about what occurred at this check stop as, along with the witnesses' testimony, there is VICS video of most of the stop, as well as what occurred sometime after. Mr. Sidhu also called similar fact evidence about Cpl. Pollard's stop on May 19, 2017. As the evidence about that stop was brief, I will include the description of the facts of that stop in the analysis.

[259] On June 4-5, 2016, the RCMP established a check stop, which was manned by a number of police officers, including Cpl. Pollard, Cst. Potter, and Cst. Allain.

[260] Cst. Allain testified at trial. He said that the purpose of the check stop was to check vehicles for anything that could compromise safety, such as motor vehicle infractions, intoxication, and fatigue. He also testified that all vehicles were stopped, except for large commercial vehicles if the inspectors verifying those vehicles were busy.

[261] Several police officers were operating the check stop. Two other police officers besides Cst. Allain were also checking vehicles.

[262] As Mr. Sidhu approached the check stop, Cpl. Pollard radioed ahead, identifying Mr. Sidhu by name, and telling the officers ahead of him to turn the cameras on. He radioed that Mr. Sidhu had been driving 107 kilometres per hour. The police understood that the speed limit in the area that Mr. Sidhu had passed through was 30 kilometres per hour. Cst. Potter waved Mr. Sidhu over. Cst. Allain performed the check stop.

[263] During the stop with Cst. Allain, Mr. Sidhu asked why he was detained and complained about Cst. Potter. In his testimony, Cst. Allain described Mr. Sidhu as

“agitated”, he said Mr. Sidhu called him something along the lines of a “fucktard” and was yelling loud enough that Cpl. Pollard, standing approximately 100 metres away, could hear.

[264] Mr. Sidhu did provide his licence and registration to Cst. Allain, and Cst. Allain wrote him a ticket for speeding. When Cst. Allain returned to the car, Mr. Sidhu yelled at him while Cst. Allain was giving him the ticket and explaining it to him. Mr. Sidhu called him a liar. Cst. Allain testified that Mr. Sidhu accused Cst. Allain of raping children; Mr. Sidhu says that he called Cst. Allain a racist, and not a rapist.

[265] Cst. Allain was acquainted with Mr. Sidhu as he had worked in Watson Lake between January 2008 and May 2010, when Mr. Sidhu was living there. His interactions with Mr. Sidhu before the stop in 2016 were uneventful. He testified that his colleagues in Watson Lake did not complain about Mr. Sidhu’s conduct.

[266] After he got the ticket, Mr. Sidhu left the check stop, but then returned some time later. The VICS video also showed Mr. Sidhu insulting the police, challenging them, and accusing them of malfeasance. Cpl. Pollard spoke to Mr. Sidhu, at one point told him that Mr. Sidhu had been there for almost an hour, and told him that if Mr. Sidhu obstructed them from doing their job, he would be arrested.

[267] Mr. Sidhu also called a witness, Clinton Teichroeb, to testify on his behalf. Mr. Teichroeb was Mr. Sidhu’s friend and had also gone through the check stop on June 4, 2016. He too was pulled over for speeding, but, in contrast to Mr. Sidhu, he was not given a ticket. He could not remember who the police officer who spoke to him was or what he looked like. At the time this occurred, he and Mr. Sidhu happened to speak about it. Mr. Sidhu asked him to write a statement, which he did.

(b) Analysis

[268] At this stop, it is the actions of Cpl. Pollard and Cst. Allain that come under question. With regard to Cpl. Pollard, he is under scrutiny because he identified that Mr. Sidhu had been speeding. Cst. Allain, of course, was the person who wrote Mr. Sidhu's ticket.

[269] The statement of claim alleged that Cst. Potter also discriminated against Mr. Sidhu during the stop and similar fact evidence was introduced about a traffic stop involving Cst. Potter. The evidence at trial did not, however, show that Cst. Potter engaged with Mr. Sidhu, nor that he played a role in giving Mr. Sidhu a ticket. As a result, Cst. Potter's actions are not at issue here.

[270] Counsel to Mr. Sidhu submits that here there is evidence that Mr. Sidhu was treated differently than other motorists. While Mr. Sidhu was given a speeding ticket, Mr. Teichroeb was not. As well, Cpl. Pollard identified Mr. Sidhu by name and told the other police officers to turn on the VICS video camera.

[271] I will first assess the allegation that Mr. Teichroeb's treatment was different than that of Mr. Sidhu. Although I find Mr. Teichroeb to be credible, I have concerns about his reliability. Mr. Teichroeb was candid that he had no memory of the stop beyond what was written in his statement. Because of this, it is difficult to give much weight to his evidence.

[272] Even if I accept Mr. Teichroeb's testimony, however, it does not advance Mr. Sidhu's position. Mr. Teichroeb did not remember which police officer stopped him. There were two other officers working with Cst. Allain who were also writing tickets. Cst. Allain testified that he rarely exercised his discretion not to give tickets. It is entirely

possible that another officer, who used their discretion more easily than Cst. Allain, was the one who dealt with Mr. Teichroeb.

[273] Cst. Allain also testified that he wrote approximately 15 speeding tickets over the two days the check stop was set up. Based on this evidence, Mr. Sidhu was not treated differently than the other drivers Cst. Allain dealt with.

[274] Cst. Allain treated Mr. Sidhu in a courteous and professional manner. I therefore conclude that Cst. Allain did not have racist intent.

[275] On the other hand, there are some questions about Cpl. Pollard's actions. In particular, Cpl. Pollard identified Mr. Sidhu by name and advised the others to turn the video on. Cst. Allain stated in his testimony that this was very unusual.

[276] Cpl. Pollard did not testify; counsel to the Attorney General explained that Cpl. Pollard was ill. I therefore must deduce, from the evidence provided, whether Cpl. Pollard was motivated by racism when he radioed ahead, naming Mr. Sidhu and telling the police officers ahead of him to turn the cameras on.

[277] The question, then, is why would Cpl. Pollard let the others know that Mr. Sidhu was arriving and ask the officers to turn the VICS cameras on? The answer rests on what information Cpl. Pollard likely had about Mr. Sidhu.

[278] Given the extent of the interactions between Mr. Sidhu and RCMP members that were instigated by Mr. Sidhu, and given that RCMP members were asked to provide information when they had interactions with Mr. Sidhu, I conclude that it is more likely than not that Cpl. Pollard was aware of Mr. Sidhu because of his history of interacting negatively with the RCMP.

[279] Seen in this context, it is probable that Cpl. Pollard identified Mr. Sidhu and told others to turn cameras on, not because of racism, but to keep an accurate record of what had occurred.

[280] This is, however, one piece of the puzzle. I must also assess the stop itself, as well as the similar fact evidence presented by Mr. Sidhu.

[281] After receiving his ticket Mr. Sidhu left, but then returned to the traffic stop and berated the RCMP. Cpl. Pollard, who was in the vicinity, did not engage, for the most part, with Mr. Sidhu. When he did, he responded to Mr. Sidhu in a neutral fashion.

[282] Mr. Sidhu's counsel also provided similar fact evidence about Cpl. Pollard, involving a stop in which Cpl. Pollard gave Mr. Sidhu a speeding ticket. The allegation of racism here turns mainly on Cpl. Pollard's actions, on Mr. Sidhu's testimony about what Cpl. Pollard said to him as he was giving him the ticket, and the fact that Mr. Sidhu was not convicted for the ticket.

[283] Mr. Sidhu's lawyer states that Cpl. Pollard acted in bad faith because, after seeing Mr. Sidhu for a few seconds in on-coming traffic, Cpl. Pollard made a U-turn and stopped Mr. Sidhu to give him a ticket. No evidence was lead about the amount of time needed for radar to register the speed of an on-coming vehicle, so I infer nothing from this evidence.

[284] In addition, according to Mr. Sidhu, Cpl. Pollard told him that he was getting a speeding ticket, and when Mr. Sidhu said that he was not speeding, Cpl. Pollard told him that he could challenge the ticket in court. Mr. Sidhu testified that he thought Cpl. Pollard was being vindictive and targeting Mr. Sidhu because Mr. Sidhu had just successfully challenged another ticket in court.

[285] However, VICS video was filed as a part of the evidence and everything Cpl. Pollard said was captured by it. Cpl. Pollard does not say what Mr. Sidhu claims he said. During the stop, Mr. Sidhu asserted that he had not been speeding and asked Cpl. Pollard such questions as why he had a firearm. Cpl. Pollard appeared exasperated, but said nothing untoward to Mr. Sidhu. When giving Mr. Sidhu his ticket, Cpl. Pollard said “here is your ticket for speeding.” Mr. Sidhu replied “Fuck you.” Cpl. Pollard then walked away.

[286] Mr. Sidhu was convicted at trial. He appealed, and the appeal was overturned on a procedural issue. The ticket was then stayed. A stay is not an acquittal. I find this is a neutral fact.

[287] I see no basis upon which to conclude that racial profiling tainted this stop or that of June 4, 2016.

G. Damages

[288] If I am wrong in my analysis, then Mr. Sidhu is entitled to damages. The parties’ submissions about damages were mostly limited to whether Mr. Sidhu suffered from Post Traumatic Stress Disorder (“PTSD”) arising out of his interactions with the RCMP. Mr. Sidhu’s lawyer provided case law about *Charter*, aggravated, and punitive damages but did not make any submissions on his entitlement to them. He did, however, make submissions on special damages.

[289] My analysis on the question of damages will therefore be limited to determining whether Mr. Sidhu suffers from PTSD because of his interactions with the RCMP and to his entitlement to special damages.

I. PTSD

[290] Dr. Koch, who is a psychologist, testified on behalf of the plaintiff. In developing his opinion, Dr. Koch had Mr. Sidhu's medical records and met Mr. Sidhu to assess him. He concluded that Mr. Sidhu did have PTSD.

[291] The defendant called Dr. Janke, a forensic psychiatrist, as a witness. He also assessed Mr. Sidhu. Dr. Janke had an audio file of Mr. Sidhu's arrest in 2011; audio and video recordings of a road stop; and phone calls he had with the RCMP and dispatch officers. He concluded that Mr. Sidhu had never suffered from PTSD.

[292] Both Dr. Koch and Dr. Janke are eminently qualified and were impressive witnesses. In the end, however, I prefer Dr. Janke's evidence. I come to this conclusion because some of the information Mr. Sidhu gave to Dr. Koch was inconsistent with independent evidence and Mr. Sidhu's evidence at trial; and because Dr. Janke had access to more materials than Dr. Koch when coming to his opinion. I therefore conclude that Dr. Janke had better information than Dr. Koch about Mr. Sidhu upon which to base his opinion.

[293] Some of the information Mr. Sidhu gave Dr. Koch did not accord with evidence the Court had before it. Thus, for example, he told Dr. Koch that he had been arrested twice in December 2012, when he was arrested once. It is also unclear whether Dr. Koch understood that Mr. Sidhu had been charged twice, although he had been charged only once.

[294] These differences may be material. Dr. Koch and Dr. Janke agreed that a criterion for a PTSD diagnosis, Criteria A Traumatic Stressor, as described at page 5 of Dr. Koch's report, is that the individual "experienced or witnessed, or was confronted

with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others”.

[295] Dr. Koch concluded that the experience of December 2, 2012, and the following days, could qualify as a Criterion A Traumatic Stressor. Given that the circumstances are less serious than Dr. Koch understood, it is possible that this would affect his conclusions.

[296] Moreover, it is unclear whether Mr. Sidhu accurately described his actions when interacting with police. For instance, during testimony he explained that, during the incident in 2011, in Watson Lake, when he was arrested and hospitalized, he at one point thrust his crotch at the police officer and made crude statements. That he acted in a provocative fashion is not noted in the report.

[297] Dr. Koch states in his report that during the check stop of December 2, 2012, Mr. Sidhu got into a “verbal argument” with the RCMP officer. However, Mr. Sidhu did more than get into a verbal argument with an officer - he was belligerent and angry throughout the stop. It is also not clear that Mr. Sidhu explained the entirety of what occurred to Dr. Koch.

[298] How Mr. Sidhu acted during these incidents could be material. Dr. Janke and Dr. Koch disagreed about whether Mr. Sidhu’s anger was consistent with a PTSD diagnosis. Dr. Koch testified that anger was not necessarily inconsistent with a diagnosis of PTSD, while Dr. Janke testified that it suggested that Mr. Sidhu was not suffering from PTSD.

[299] I do not believe that Dr. Janke was saying that anger is always inconsistent with a PTSD diagnosis. Rather, I believe he was opining that the nature of Mr. Sidhu’s anger

was not suggestive of PTSD and that the element of fear, which is consistent with PTSD, was missing. Dr. Koch did not appear to have information about Mr. Sidhu's anger, and how it was expressed in his interactions with the RCMP. I conclude that this could have affected his assessment of Mr. Sidhu.

[300] Lack of access to independent information may also have had an impact on Dr. Koch's assessment of whether Mr. Sidhu engaged in avoidance behaviour.

Avoidance is a diagnostic criterion for PTSD. Dr. Koch testified that Mr. Sidhu could not tell him how often he avoided the RCMP, though he said that Mr. Sidhu had told him he did avoid the RCMP. Knowledge that Mr. Sidhu in fact sought out contact with the RCMP could have had an impact Dr. Koch's diagnosis.

[301] Dr. Koch and Dr. Janke both noted that Mr. Sidhu was inconsistent and difficult to interview. Dr. Koch stated that this made it difficult to assess Mr. Sidhu. The Court, as well, has noted problems with Mr. Sidhu's credibility and reliability. This, combined with Dr. Koch's reliance on Mr. Sidhu's self-reported experiences and symptoms, and his lack of access to other documents, leads me to prefer Dr. Janke's evidence to that of Dr. Koch. I therefore conclude that Mr. Sidhu never had PTSD.

II. Special Damages

[302] I conclude that, if Mr. Sidhu is entitled to damages, then he would be entitled to: \$27,825 for legal fees spent to defend himself against uttering threats charge; and \$1,799.94 for counselling sessions.

CONCLUSION

[303] Mr. Sidhu alleged that the police officers named in the statement of claim discriminated against him on the basis of race during police stops, and in charging him

and arresting him on the charge of uttering threats. He traced the racism back to Watson Lake, alleging that the racist attitudes of the police officers in Watson Lake transferred to police officers in Whitehorse. The police targeted him and wanted to “get him” for being a thorn in the side of the RCMP.

[304] The evidence at trial showed that some, but not all, of the individuals involved in the stops and in the arrest in 2012 had information about Mr. Sidhu, and of the incidents between him and members of the RCMP in Watson Lake. Mr. Sidhu was not, however, of particular interest to the police officers. There is no basis to conclude that the police targeted him, or wanted to “get even” with him.

[305] I also conclude that the individuals involved in the stops and arrest were not motivated by racism. The December 2, 2012 check stop was, therefore, not unlawful. Mr. Sidhu was not subject to malicious prosecution. On December 5, 2012, he was neither unlawfully arrested nor was he assaulted.

[306] I find that, after 2012, Mr. Sidhu became more well-known within the Whitehorse police detachment and that the RCMP were concerned about him. However, this was because of Mr. Sidhu’s actions. Mr. Sidhu acted in a problematic way with members of the RCMP. Treating him differently was not unreasonable and was not motivated by racism. He was not racially profiled during the check stop on June 4, 2016.

[307] I dismiss Mr. Sidhu’s claim.

[308] Costs may be spoken to in case management if the parties are unable to agree.

WENCKEBACH J.